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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 301

THE VIRGINIAN RAILWAY COMPANY,
Defendant-Petitioner,

—against—

JAMES ERNEST ROSE, an infant, by ERNEST ROSE, his next friend, and ERNEST ROSE and JANICE ROSE,
Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Virginian Railway Company, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case, which affirmed a judgment of the United States District Court for the Southern District of West Virginia in favor of plaintiffs-respondents against petitioner in the total sum of $167,500.

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit is printed as Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit, which petitioner prays this Court to review, was dated and entered on May 16, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., §1254(1).

Question Presented

The infant plaintiff-respondent was hit by petitioner's train while he was trespassing on its single track railroad bridge. The Court of Appeals affirmed the judgments below in favor of the infant plaintiff for his injuries and in favor of his parents for his medical expenses and the loss of his services despite the fact that the uncontradicted testimony at the trial showed that no one charged with the operation of the train saw the boy prior to the accident.

The question presented is:

Although the law of West Virginia clearly imposes no duty upon a railroad to maintain a lookout for adult trespassers upon its tracks and bridges and merely requires the train crew, having actually seen such a trespasser, to take all reasonable steps to prevent injury to him, does the law of that State require a railroad to maintain a lookout for infant trespassers so that, if an infant trespasser is injured, he can hold the railroad liable for damages even though he was not seen, despite the fact that the age of the trespasser could not be known at least until he is seen, and not always then?

Statement

Petitioner, The Virginian Railway Company, operates a single track railway running generally east and west through Wyoming County, West Virginia. Near the outer limits of the Town of Pineville, which has a population of about 1800, the track crosses Pinnacle Creek on a single track bridge or trestle some 123 feet in length and about 24 feet above the creek. The track and bridge have an eight degree curve to the right going over the creek in a westerly direction.

On the afternoon of May 15, 1957, Jimmy Rose, a boy then 9 years and 8 months old, went onto the bridge for the purpose of fishing from it in the creek below. He fished from a squatting position on the south side of the tracks toward the westerly end of the bridge. While in this position he felt the track vibrate and heard an approaching train. He looked up, saw petitioner's train approaching from the east and attempted to run off the western end of the bridge. Before reaching the end of the bridge, however, his foot got caught between the cross ties and just as he pulled his foot free he was struck by the train, carried beyond the end of the bridge and thrown off the track. (Pltf. App. p. 2, Def. App. pp. 38-41) *

Conflicting testimony was offered by the respective parties on the questions of whether or not the train engineer was maintaining a lookout at and just prior

* Citations in parentheses refer to pages of the appendices filed by the respective parties in the United States Court of Appeals for the Fourth Circuit.

to the time of the accident and whether or not he had a clear view of the track and bridge ahead so that he could have seen the boy if he had maintained a lookout and if he had seen the boy, he could have stopped the train short of the point of impact. There was also conflicting testimony as to the frequency with which the bridge was used by trespassers either for fishing or simply for crossing over the creek.

None of the train crew saw the boy on the bridge or knew of the accident until a dispatcher signalled the train to halt at a point about one mile beyond the bridge. (Def. App. pp. 18-19)

The Trial Judge instructed the jury that it was the duty of petitioner to keep a reasonable lookout for children trespassing upon its tracks. (Def. App. p. 11) The jury, thus instructed, returned a verdict in favor of the boy for $150,000 plus an additional award of $17,500 for his parents. These verdicts were affirmed by the Court of Appeals for the Fourth Circuit.

The Virginian Railway Company is a Virginia Corporation. The plaintiffs are citizens of West Virginia. Consequently, jurisdiction in the Federal District Court was based on diversity of citizenship and the amount in controversy pursuant to 28 U. S. C. §1332.

Reasons Why the Writ Should Be Granted

A. The Decision of the Court of Appeals for the Fourth Circuit Conflicts With the Applicable Law Declared by the Supreme Court of Appeals of West Virginia.

A railroad under West Virginia law owes no affirmative duty to protect trespassers against injury by a moving train. If, however, a train crew discovers anyone in a position of danger on the tracks, then the crew must take all reasonable steps to avoid injury to the person endangered. These principles have been long established and recently re-affirmed by the Supreme Court of Appeals of West Virginia.

Huff v. *Chesapeake & O. Ry. Co.*, 48 W. Va. 45, 35 S. E. 866 (1900);
Ballard v. *Charleston Interurban R. Co.*, 113 W. Va. 660, 169 S. E. 524 (1933);
Connelly v. *Virginian Ry. Co.*, 124 W. Va. 254, 20 S. E. 2d 885 (1942);
Hall v. *Monongahela West Penn Public Service Co.*, 128 W. Va. 547, 37 S. E. 2d 471 (1946);
Stokey v. *Norfolk and Western Ry. Co.*, 132 W. Va. 771, 55 S. E. 2d 102 (1949).

In the *Huff* case, *supra*, William C. Huff, was struck and severely injured by a yard engine backing into a round house.

In its opinion, the Court stated;

> "What duty did the company owe Huff? If it broke no duty, how can we mulct it in damages, even to repair this unfortunate man's calamity? The only duty the company owed him

was not to wantonly or wilfully injure him. Had its employes seen him in time to save him, it would have been their duty to use ordinary care to do so. But how could they see him that dark night, when the engine was backing? And, even if they had seen him, they might presume that he would get off the track. Beach, Contrib. Neg. s. 202, says: 'As a general rule, a trespasser on the track is held to be there at his own peril. He must keep himself informed of the approach of trains from any direction, and, in case of injury, will be held guilty of such contributory negligence that he cannot recover from the railway, notwithstanding concurrent negligence on their part.' Section 203 says: 'The liability of a railroad company to a trespasser on its tracks must be measured by the conduct of its employes, after they became aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the trespasser will defeat a recovery.'" (48 W. Va. at p. 48.)

In the *Ballard* case, *supra*, the plaintiff recovered a verdict for personal injuries sustained by being struck by one of defendant's interurban electric cars. Plaintiff was struck while walking on the railroad tracks, a few minutes after she had alighted from another of defendant's cars.

The Court noted that at the time of alighting, the plaintiff, as a passenger, was owed a duty by the defendant to do what was reasonably necessary to insure her safety in leaving its premises. However, the Court below found that it was not necessary for

the plaintiff to use defendant's tracks as a passway and hence, the plaintiff was at most, a mere licensee.

In its opinion, the Court stated:

> "The motorman first saw plaintiff when within fifty feet of her. There is no testimony in the record that he did not use reasonable care to avoid the accident after discovering her. While he might possibly have discovered her a few seconds sooner, had he maintained a constant lookout, it must be borne in mind that the law in this state imposes no such duty in respect to pedestrians upon the track at a point where they have no lawful right to be at any time . . ." (113 W. Va. at p. 663.)

In the *Connelly* case, *supra,* the decedent was killed when struck by a coal train which was backing up. The decedent was on the railroad track at the end of a "side hill cut" around a curve from the approaching train. It was alleged that at the point of impact the decedent was sitting upon a tie at the left of defendant's track with his head in his arms and that he was unconscious.

In its opinion, the Court stated:

> "Looking upon the plaintiff's decedent as a trespasser to whom the defendant owed no positive duty, we believe that the fifth and sixth syllabus points in the previously cited case of *Raines* v. *Chesapeake & Ohio Railway Co.,* 39 W. Va. 50, 19 S. E. 565, 566, 24 L. R. A. 226, which refer specifically to a trespasser upon the property of a railroad company fit the circum-

stances of this case exactly. They read as follows:

"'If those running a railroad train discover a trespasser in imminent danger on the track, they must use all reasonable exertions to avoid inflicting injury; otherwise, the company will be responsible.'"

"'But, if they omit no duty after becoming aware of his danger, the railroad company will not be responsible for such injury.'" (124 W. Va. at p. 261.)

In the *Stokey* case, *supra,* where the facts were similar to those herein, the decedent, Mrs. Stokey, was struck and killed by a train while she was walking on a railroad bridge between the Towns of Keystone and Northfork, West Virginia.

In its opinion, the Court stated:

". . . . Immediately upon her entrance on the bridge, Mrs. Stokey placed herself in a position of imminent peril. Various responsible witnesses testified concerning the danger of using the bridge as a means of foot travel. In *Hall* v. *Monongahela West Penn Public Service Co.,* 128 W. Va. 547, pt. 1 syl., 37 S. E. 2d 471, a case in which the decedent Hall was struck and killed on defendant railway company's bridge, this Court held: '"One not in the employ of a railway company, using its tracks as a walk way over a portion thereof which pedestrians are accustomed to use for such purpose, but not at a public crossing, is at most a mere licensee, and such railway company owes to him no higher or other duty than it owes to a trespasser." Pt. 1,

syl., *Blagg, Admr.* v. *Baltimore & Ohio Railroad Co.*, 83 W. V. 449. Such duty is no higher than not wantonly or wilfully to injury such pedestrian.' The *Hall* case was followed by the recent case of *Payne* v. *Virginian Railway Co.*, 131 W. Va. 767, 51 S. E. 2d 514." (132 W. Va. at 781-2.)

* * * *

"The instant case was tried, and properly so, upon the theory of the holdings of this Court in *Hall* v. *West Penn Public Service Co., supra, and Blagg, Admr.* v. *Baltimore & Ohio Railroad Co., supra,* in which cases the plaintiffs were not in the employ of the defendant railway companies, and were using the tracks as a walkway over a portion thereof, which pedestrians were accustomed to use for such purposes, but not at public crossings. In each of these cases this Court held that the plaintiff 'is at most a mere licensee, and such railway company owes to him no higher or other duty than it owes to a trespasser', which is the duty not wantonly and wilfully to injure such pedestrian . . . ." (132 W. Va. at p. 790.)

The principles of law enunciated in the foregoing comparatively recent cases, which cover a span of some 49 years, are clear, consistent and logical. They are in accord with the common law in effect in most jurisdictions. 2 Restatement of Torts §§333 and 336.

The Fourth Circuit, however, we respectfuly submit, fell into error in rejecting these cases in favor of a few, old, isolated decisions, beginning with *Gunn* v. *Ohio River R. Co.*, 42 W. Va. 676, 26 S. E. 546 (1896) and concluding with the thirty-nine year old

decision in *Robertson* v. *Coal & Coke Ry. Co.*, 87 W. Va. 106, 104 S. E. 615 (1920), which deviated from accepted common law principles in declaring that a railroad had a duty to maintain a lookout for infant trespassers on its tracks and which have long since lost whatever vitality they may have once enjoyed.

If the law of West Virginia requires that a lookout be maintained for children, of necessity the same law requires a lookout for adults. It is logically absurd to require a duty of lookout for children while pretending that no such duty exists toward adults. A lookout for children is equally a lookout for adults. Conversely, no lookout can be required for children without requiring a lookout for adults. Otherwise most unfair and incongruous results could obtain.

For example, assume there are two trespassers fishing from a railroad bridge. One is a large 13 years of age and the other a small 21. They are sitting side by side when, unfortunately, a train comes along and injures both of them. According to the decision below, if the train crew did not see either of the trespassers before the point of impact, the railroad could be found liable for injuries to the thirteen year old but not for injuries to the twenty-one year old. The result would obtain purely because of the age of the injured party which would only be determined after the event.

Elemental principles of justice and logic are obviously flouted by such a result. Either the railroad should be liable for injuries to both or to neither. In its decision, the Fourth Circuit concluded that there were two lines of cases co-existing in West Virginia, one requiring a railroad to maintain a lookout in order to avoid injury to infant trespassers and the

other holding that the railroad had no duty to maintain a lookout to avoid injury to adult passengers but merely had the duty of not injuring them wilfully or wantonly after they have been discovered on the tracks.

No one contends that a child cannot be a trespasser. Yet, if the law of West Virginia is as declared by the Fourth Circuit herein, there are no longer any infant trespassers on railroad tracks in that State—all now have the status of invitees. As a matter of logic and practicality, by that decision the Court of Appeals has compelled each train crew on a train operating in West Virginia to keep a constant lookout for trespassers, both infant and adult, on its tracks, as the age of the trespasser can't be known until he is seen. Yet as we have demonstrated, the law of West Virginia as laid down by its highest Court, does not require the maintenance of a lookout for adult trespassers. The decision of the Fourth Circuit herein is therefore in conflict with the applicable decisions of the highest court of West Virginia and should, we submit, be reviewed by this Court.

B. The Principles of Law Governing the Operation of Railroads Are of Pervasive Public Interest and of General Importance.

The State of West Virginia is served by a network of approximately twenty-three railroads whose operation is essential to the commercial life of its farms and industries. Among these railroads serving the citizens of West Virginia, whose operations are necessarily affected by the decision herein, are The Baltimore and Ohio, The Chesapeake and Ohio, The New York Central, The Norfolk and Western and

The Pennsylvania. The railroad tracks of these railroads and petitioner's necessarily run through cities, towns and areas which are thinly populated. There are more than 3,000 miles of railroad lines within the State.

The railroads realize, though they do not consent to, the fact that many persons trespass on their tracks every day. It would be impracticable and unreasonable to require sufficient guards and fences to prevent trespassers from placing themselves in dangerous positions on the miles of tracks and bridges throughout the State. The decision of the Fourth Circuit herein goes a long way toward making the railroads responsible for injuries resulting from the behavior of persons too numerous to control; whose presence cannot be anticipated; and who have no right to be on railroad property in any event. Where, as here, such a decision is in evident conflict with the applicable state law declared by its highest court, the obvious public interest in and general importance of this basic question of railroad liability should merit the attention of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS S. BENSEL
Attorney for Petitioner

APPENDIX A

Opinion

Filed May 16, 1959.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7796.

THE VIRGINIAN RAILWAY COMPANY, a corporation, Appellant,

versus

JAMES ERNEST ROSE, an infant, by ERNEST ROSE, his next friend, and ERNEST ROSE and JANICE ROSE, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BECKLEY. BEN MOORE, DISTRICT JUDGE.

(Argued March 10, 1959. Decided May 16, 1959.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge and BOREMAN, District Judge.

Fletcher W. Mann for Appellant, and W. A. Thornhill, III.

(W. A. Thornhill on brief for Appellees.)

SOBELOFF, Chief Judge:

The defendant railroad company appeals from adverse judgments entered in the District Court in favor of James Ernest Rose, an infant, for personal injuries, and in favor of his parents for medical expenses and loss of their son's services.

The defendant operates a single track railway through Wyoming County, West Virginia, which crosses a bridge, or trestle, located on the perimeter of the Town of Pineville, having a population of about 1800. The structure is 123 feet long, is 24 feet above a creek and has an eight degree curve to the right. On the afternoon of May 15, 1957, in clear weather, Jimmy Rose, then 9 years and 8 months of age, was fishing from the trestle. Feeling "the track vibrating" and hearing "some wheels squeaking," he looked up and saw a train approaching. The train "wasn't too close," and as Jimmy ran to get off the trestle, his foot got "hung" in a crack between the ties. When he pulled his foot out he was hit by the defendant's train; carried 50 feet beyond the end of the bridge, and thrown off the track. The engineer did not see him and had no knowledge of the accident until signalled by a dispatcher one mile beyond the point of impact to stop the train. The train's speed was 12 to 14 miles per hour. Although the engineer stated in his deposition that his view of the trestle was blocked by the 49 foot hood of the locomotive, there was ample competent testimony and physical fact from which a jury could find that the engineer, if he had been looking, could have seen the plaintiff in time to stop the train and avoid the accident.

The injuries included the loss of one leg and most

of the right arm. The boy has had to undergo numerous operations and now uses artificial limbs. The jury returned a verdict of $150,000.00 for him and $17,500.00 for his parents.

I.

The boy was admittedly a trespasser on the defendant's railroad trestle. The jury was instructed that those who are in charge of trains have the duty to keep a reasonable lookout for children trespassing on the tracks, not a constant lookout but "a reasonable lookout consistent with the proper performance of their other duties in running the train"; and that the duty varies with the circumstances at the time and place of the accident, the duty being slight "if the place is remote and persons are not known by the train crew to use the track or ordinarily expected to be on it," and increasing "in degree in proportion to the density of population [and] the foreseeable probability of persons being on the track." Under this instruction the jury could reasonably conclude that the railroad was negligent in not maintaining a proper lookout, for testimony by numerous persons revealed that the area around the trestle was popular for fishing and that they and others had fished from the bridge.

However, the defendant contends that the law in West Virginia is contrary to the court's instruction in that no duty is imposed upon a railroad to maintain a lookout for trespassers. As to such persons, it is argued that a duty arises only *after* they are actually discovered on the tracks, the duty then being to refrain from inflicting wilful or wanton injury. The

Supreme Court of Appeals of West Virginia appears to have developed simultaneously two doctrines as to a railroad's duty to persons injured at a place other than a public crossing. The defendant relies on the line of cases—all involving adult trespassers—which hold that the railroad owes a duty no higher than not to injure them wilfully or wantonly after they have been discovered on the tracks. *Raines* v. *Chesapeake & O. Ry. Co.*, 39 W.Va. 50, 19 S.E. 565 (1894); *Huff* v. *Chesapeake & O. Ry. Co.*, 48 W.Va. 45, 35 S.E. 866 (1900); *Ballard* v. *Charleston Interurban R. Co.*, 113 W.Va. 660, 169 S.E. 524 (1933); *Barron* v. *Baltimore & O. R. Co.*, 116 W.Va. 21, 178 S.E. 277 (1935); *Connelly* v. *Virginian Ry. Co.*, 124 W.Va. 254, 20 S.E. 2d 885 (1942); *Hall* v. *Monongahela West Penn Public Service Co.*, 128 W.Va. 547, 37 S.E. 2d 471 (1946); *Payne* v. *Virginian Ry. Co.*, 131 W.Va. 767, 51 S.E. 2d 514 (1948); and *Stokey* v. *Norfolk & Western Ry. Co.*, 132 W.Va. 771, 55 S.E. 2d 102 (1949). Several of these cases (*Raines, Huff* and *Payne*) are inapposite, for the injuries occurred in railroad yards, a circumstance held by the West Virginia Court to be sufficient to exonerate the railroad from liability to trespassers. See *Payne* v. *Virginian Ry. Co.*, 131 W.Va. 767, 51 S.E. 2d 514, 517 (1948). Moreover, the recent *Hall* and *Stokey* cases do not pertain to lookout, for in them the railroads were found to be wantonly negligent in not stopping the train after discovering the trespassers.

The plaintiffs, on the other hand, point to those cases which hold that, at least where infants are concerned, the railroad must keep a reasonable lookout to discover trespassers on the tracks. *Gunn* v. *Ohio River R. Co.*, 42 W.Va. 676, 26 S.E. 546 (1896);

McGuire v. *Norfolk & W. Ry. Co.*, 70 W.Va. 538, 74 S.E. 859 (1912); *Bias* v. *Chesapeake & O. Ry. Co.*, 46 W.Va. 349, 33 S.E. 240 (1899); *Dempsey* v. *Norfolk & W. Ry. Co.*, 69 W.Va. 271, 71 S.E. 284 (1911); *Prok* v. *Norfolk & W. Ry. Co.*, 75 W.Va. 697, 84 S.E. 568 (1915); *Dickinson* v. *New River & Pocohontas Consol. Coal Co.*, 76 W.Va. 148, 85 S.E. 71, 73 (1915); and *Robertson* v. *Coal & Coke Ry. Co.*, 87 W.Va. 106, 104 S.E. 615 (1920).[1]

McGuire v. *Norfolk & W. Ry. Co.*, 70 W.Va. 538, 74 S.E. 859, 862 (1912) affords an explanation for these seemingly variant principles:

> "The law imposes a greater duty upon railroad companies to keep a lookout for small children trespassing upon its tracks than it does in case of adult persons in full possession of their faculties. It owes to the former the duty to keep a reasonable lookout for them consistent with the other duties of its employes engaged in the operation of its trains; and if children are discovered upon the tracks, or perilously near the same, the company's servants are bound to exercise reasonable diligence to avoid injury to them. Defendant's instruction No. 7 was therefore properly refused. By it defendant asked the court to apply the same rule to the infant deceased that the law applies in the case of an adult trespasser."

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[1] One judge on the Supreme Court of Appeals of West Virginia has characterized this area of the law as follows: ". . . our cases are in well nigh hopeless conflict." *Payne* v. *Virginian Ry. Co.*, 131 W.Va. 767, 51 S.E. 2d 514, 521. Even so, it would not be for us to attempt to reconcile all the cases; but we think no such conflict exists in respect to infants.

It is not for us to debate the justification for this distinction, but only to follow the law as enunciated by the highest court of the State. Undoubtedly, the West Virginia Court has permitted recovery by infant trespassers in circumstances where relief would be denied to adults. Indeed, the defendant has cited no case denying recovery to an infant trespasser where the railroad could have avoided the accident, had a reasonable lookout been maintained.[2] A study of the cases convinces us that the trial Judge properly applied the West Virginia law, which required the case to be submitted to the jury.

II.

The defendant asserts that the trial Judge should have declared the plaintiff guilty of contributory negligence as a matter of law, and that he erred in submitting the question to the jury. We do not agree. In West Virginia the presumption, although rebuttable

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[2] *Angiline* v. *Norfolk & W. Ry. Co.*, 99 W.Va. 85, 128 S.E. 275 (1925) is not in point. There the brakeman repeatedly warned the plaintiff, almost 6 years old, not to jump on the train. The plaintiff paid no attention, and when the train started moving and the brakeman was not in sight, the plaintiff grabbed hold of a stirrup on one of the moving cars and was injured. In affirming judgment for the railroad, the Court said that the duty of a railroad to keep a lookout for trespassing children did not extend to requiring the railroad "to police its tracks while the trains were in motion to see that trespassers did not board the cars, or to stop the movement of the trains because some trespasser has indicated a disposition to board it."

Martin v. *Hughes Creek Coal Co.*, 70 W.Va. 711, 75 S.E. 50 (1912) and *Dickinson* v. *New River & Pocahontas Consol. Coal Co.*, 76 W.Va. 148, 85 S.E. 71 (1915) are dissimilar, for, as was clearly stated in these opinions, the lookout duty of a public railroad is not applicable to a private coal company operating its own railway.

is that a child between the ages of 7 and 14 years is incapable of contributory negligence, *Pitzer* v. *M. D. Tomkies & Sons,* 136 W.Va. 268, 67 S.E. 2d 437, 442 (1951), and where the defendant owes a duty to exercise reasonable care for an infant plaintiff's safety, the burden of proving such a plaintiff's mental capacity to comprehend and avoid danger is on the defendant. *Simmons* v. *Chesapeake & O. Ry. Co.,* 97 W.Va. 104, 124 S.E. 503, 505 (1924). We cannot say, nor was it for the District Judge to say, as a matter of law that the plaintiff, 9 years and 8 months of age, acted unreasonably and thoughtlessly for a boy of his age and intelligence by fishing from the railroad trestle and failing to escape from his position of danger in time to avoid the oncoming train.[3] As was said in *Stokey* v. *Norfolk & Western Ry. Co.,* 132 W.Va. 771, 55 S.E. 2d 102, 110 (1949): "Whether decedent [74 years old] could or could not have escaped from her perilous position [on the railroad's bridge] undoubtedly is a jury question."

III.

The defendant further contends that the parents are not entitled to recover for the medical expenses and loss of their son's services because the mother herself was negligent in permitting him to be upon the trestle. On the afternoon of the accident, she

[3] *Donald* v. *Long Branch Coal Co.,* 86 W.Va. 249, 103 S.E. 55 (1920), does not support the defendant's contention that the infant plaintiff's catching his foot in the cross-tie while attempting to run from the trestle was the proximate cause of his injury. In the *Donald* case, the plaintiff's injury was caused by her *leaving a place of safety* and then tripping on some cross-ties the defendant had placed in a ditch near the track.

drove the boy to a young friend's home, which was next to the railroad tracks, so that he could go fishing with the friend and his grandfather. The mother left Jimmy in front of the house, said that she would return to pick him up in an hour, and drove off. Discovering that no one was in the house, Jimmy proceeded alone to the railroad trestle where the accident happened. Considering that he had never before gone on the trestle and that his mother thought that an adult would accompany him while fishing, it was for the jury to decide whether the mother should have been more diligent in ascertaining whether someone was home. The circumstances under which Jimmy was left in front of the house are insufficient in law automatically to bar the parents' recovery.

IV.

The defendant next complains that the verdicts are excessive and that the trial court abused its discretion in refusing to set them aside. The parents were awarded $17,500.00. It was shown that the medical expenses already incurred, plus anticipated medical bills and cost of artificial limbs until the boy becomes 21 years of age, total more than $15,000.00. Attributing the remainder of the verdict to anticipated loss of earnings during legal infancy, it cannot be said that the jury's estimate of this loss of services, to which the parents are entitled, was unreasonably speculative.

The award to the infant plaintiff of $150,000.00 is attacked by the defendant, relying on *Virginian Ry. Co. v. Armentrout*, 166 F. 2d 400 (4 cir., 1948). In that case, this Court considered excessive a verdict

of $160,000.00 in favor of a 13 month old baby who lost one arm above the elbow and the other above the wrist when run over by one of the defendant's trains. It does not necessarily follow, however, that a verdict deemed excessive ten years ago must be viewed similarly today. Common experience attests that the value of the dollar has been subject to consistent depreciation, the cost of living index having risen 23.7% since 1947-48.[4] In *Armentrout* the Court compared the amount of the verdict to the maximum workmen's compensation benefits then allowed in West Virginia. Significantly, this maximum figure is now 67% greater, West Virginia Code of 1955, Sec. 2531 (h).

The testimony reveals that the cost of artificial limbs alone from the age 21 for the duration of this plaintiff's life expectancy is estimated at $20,000.00. Also before the jury was the fact that the boy's Intelligence Quotient was less than 100. Since it is unlikely that he will "develop high earning capacity in intellectual pursuits," *Virginian Ry. Co.* v. *Armentrout, supra,* his loss of earning power is rendered greater in a manual vocation. Relevant also,

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[4] *Monthly Labor Review*, January, 1959, p. 112. Courts, federal and state, throughout the land have taken judicial notice of the diminished purchasing power of money and have held that this is a factor to be considered in making and in reviewing awards of damages. *Kroger Company* v. *Rawlings*, 251 F. 2d 943 (6 cir., 1958); *Cox* v. *Remillard*, 237 F. 2d 909 (9 cir., 1956); *Kessen* v. *Bernhardt*, 157 F. Supp. 652 (D.C. Minn., 1958); *Foster* v. *Donora Southern Railroad Company*, 144 F. Supp. 297 (D.C.W.D., Pa., 1956), aff'd, 241 F. 2d 714 (3 cir., 1957); *Hord* v. *National Homeopathic Hospital*, 102 F. Supp. 792 (D.C.D.C., 1952), aff'd, 204 F. 2d 397 (D.C. cir., 1953). *Cf. Waterman S. S. Corporation* v. *Dean*, 171 F. 2d 408, 413 (4 cir., 1948). See also Annotation: Damages—Increased Cost of Living, 12 A.L.R. 2d 611, and annual supplements thereto, for references to state cases.

perhaps, is that the humiliation suffered, according to the reasoning in *Armentrout*, is increased when the mutilation is sustained in later years of life; and in the case at bar we are concerned with a boy almost 10 years old, compared to a 13 month old infant in *Armentrout*.

The jury was not subjected in the instant case to an emotional appeal by the District Judge, as is said to have happened in *Armentrout*. Considering all the circumstances, we find no abuse of discretion in his denial of the motion to set the verdicts aside for excessiveness.

V.

The defendant's remaining claims involve alleged abuses of judicial discretion by the trial court in refusing to permit the jury to view the scene of the accident, 38 miles from the courthouse; in certain rulings, restrictive or expansive, relating to the scope of the testimony in chief and particularly on cross-examination; and in making certain comments during the trial. These and similar assignments of error have been considered. None, in our opinion, is meritorious or requires discussion. The trial was fairly conducted, and the jury was competently and correctly instructed on all aspects of the case.

The judgments of the District Court will be

Affirmed.

Judgment

Filed and Entered May 16, 1959.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7796.

THE VIRGINIAN RAILWAY COMPANY, a corporation,

Appellant.

vs.

JAMES ERNEST ROSE, an infant, by ERNEST ROSE, his next friend, and ERNEST ROSE and JANICE ROSE,

Appellees.

APPEALS FROM the United States District Court for the Southern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby, affirmed with costs.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

H. S. BOREMAN
United States District Judge.

June 16, 1959, mandate issued and transmitted to the Clerk of the United States District Court at Charleston, West Virginia:

June 16, 1959, original exhibits, including chart, returned to the Clerk of the United States District Court at Charleston, West Virginia.

ILE COPY

FILED
SEP. 4 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 301

THE VIRGINIAN RAILWAY COMPANY,
Defendant-Petitioner,

VS:

JAMES ERNEST ROSE, an infant, by ERNEST ROSE, his next friend, and ERNEST ROSE and JANICE ROSE,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Beckley, West Virginia

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

Questions Presented

Respondents respectfully submit that the only questions raised by this case are:

1. Does the common law of the State of West Virginia require that railroad locomotive crews maintain a reasonable lookout for infant trespassers on the railroad tracks?

2. If the answer to question number one is in the affirmative, do the federal courts have any power by virtue of the Constitution, or otherwise, to change the substantive rules of common law of the State of West Virginia?

Reasons Why the Writ Should Be Denied

A. THE REASONABLE LOOKOUT RULE IS THE LAW OF WEST VIRGINIA APPLICABLE TO INFANT TRESPASSERS ON RAILROAD TRACKS.

Petitioner cites five cases in support of its contention that the Court of Appeals for the Fourth Circuit and the Trial Judge did not apply the proper West Virginia law to this case. None of these five cases involved infant trespassers. The reason for this omission is that no West Virginia case can be found denying recovery to an infant trespasser where the railroad could have avoided the accident had a reasonable lookout been maintained.

The petition fails to mention the very cases which the Court of Appeals held applicable to the present case. It apparently does not contend that these cases have been overruled, but merely theorizes that they have "lost whatever vitality they may have once enjoyed." Whether it is 39 years or 2 years since a case has been decided, respondents are unable to understand how plain and unequivocal language such as that which follows can be properly said to have lost its vitality.

> "[W]e are of opinion, from principles already announced by this Court, that a railroad company owes to a child on its track, apparently insensible

of its danger, the duty of ordinary care in keeping before its running train an outlook, reasonable according to the circumstances, in order to discover the child * * * ." **Gunn** v. **Ohio River R. Co.**, 36 W. Va. 165, 178, 14 S. E. 465, 469 (1892) [First Appeal].

"The lookout in all cases is necessary, owing to the dangerous speed at which trains are permitted to pass through the country, but the care to be exercised depends entirely upon the circumstances." **Davidson** v. **Pittsburgh C. C. & St. L. Ry. Co.**, 41 W. Va. 407, 419, 23 S. E. 593, 597 (1895).

"But the sole question is as to whether he was keeping such lookout for helpless trespassers on the track, consistent with his other duties, as the law requires, or was he negligent in this respect." **Bias** v. **Chesapeake & O. Ry. Co.**, 46 W. Va. 349, 357, 33 S. E. 240, 243 (1899)

"It was the duty of the engineer to observe this child, and to stop. * * * We do not know how it came to injury. But pregnant is the fact that the child was on or very near the track when the train approached and that the engineer was derelict in not observing its danger and protecting it." **Dempsey** v. **Norfolk & W. Ry. Co.**, 69 W. Va. 271, 274, 71 S. E. 284, 286 (1911)

"The preponderance of authority perhaps is that a railroad company is not bound to keep a watch for children on its track. * * * But our law is different." **Martin** v. **Hughes Creek Coal Co.**, 70 W. Va. 711, 715, 75 S. E. 50, 52 (1912)

"Whatever may be the rule in other jurisdictions, it is settled law in this State, concerning the operation of trains, that it is the duty of those in charge of them to keep a reasonable lookout for animals and persons trespassing upon the tracks." **Stuck** v. **Kanawha & M. Ry. Co.**, 76 W. Va. 453, 455, 86 S. E. 13, 14 (1915).

"The doctrine of our cases is, as before stated, that a railroad company's duty to children trespassers is to keep a reasonable lookout for them while trespassing on its tracks, and when discovered in a situation of danger to use reasonable precaution not to injure them." **Angiline** v. **Norfolk & W. Ry. Co.**, 99 W. Va. 85, 91, 128 S. E. 275, 277 (1925).

Respondents submit that the above cases and others to the same effect represent the West Virginia law on this subject until such time as the Supreme Court of Appeals of West Virginia overrules them.

B. THERE IS NO CONFLICT IN WEST VIRGINIA LAW WITH RESPECT TO INFANT TRESPASSERS ON RAILROAD TRACKS.

Petitioner seems to insist that the reasonable lookout rule is in conflict with the wilful and wanton rule on which the petitioner relies. The Court of Appeals for the Fourth Circuit stated that even if a conflict does exist in the cases it is not for the federal judiciary to resolve it. The Court of Appeals adds its opinion that "no such conflict exists in respect to infants." Although entirely ignored by the petitioner in its petition and also in the lower court, the Supreme Court of Appeals of West Virginia has clearly

stated the reason for applying different rules to adults than to children.

> "If Henry C. Mayes had been an adult, no recovery could be had for his death, as he met his sad and early death on the railroad track, and the defense of contributory negligence would defeat recovery; but a child of the tender years of this child is not chargeable with contributory negligence, for want of judgment, discretion, and presence of mind to know and avoid danger." **Gunn** v. **Ohio River R. Co.**, 42 W. Va. 676, 680, 26 S. E. 546 (1896) [Second Appeal].

> "The law imposes a greater duty upon railroad companies to keep a lookout for small children trespassing upon its tracks than it does in case of adult persons in full possession of their faculties." **McGuire** v. **Norfolk & W. Ry. Co.**, 70 W. Va. 538, 545, 74 S. E. 859, 862 (1912).

> "But considering the ages of the persons injured, Stuck then being about ten years old and Prok being about four, and the facts and circumstances in proof, the comparative difference between the principles governing the two classes of cases becomes obvious. Those cases were dealing with infants, whose immature and undeveloped powers of discernment do not qualify them to appreciate and avoid the consequences of their own immaturity and rashness." **Cheek** v. **Director General**, 87 W. Va. 321, 325, 104 S. E. 618, 619 (1920).

The Court of Appeals properly decided that it was not up to it to debate the distinction between adult

and infant trespassers, but only to follow the law. But petitioner seems to take the position that the two lines of West Virginia cases—one for adults and one for infants—leads to absurd results, a position which respondents vigorously protest. Taking petitioner's hypothetical case (page 10 of petition) of a 21 year old trespasser and 13 year old trespasser, respondents suggest the addition of a 6 year old trespasser. If a train struck all three of them, and the crew did not see them but could have seen them if a reasonable lookout had been maintained, the following results would occur under West Virginia law:

1. The 21 year old could not recover because of his own contributory negligence. **Huff** v. **Chesapeake & Ohio Ry. Co.**, 48 W. Va. 45, 35 S. E. 866 (1900); **Gunn** v. **Ohio River R. Co., supra,** [Second Appeal].

2. It would be a jury question as to whether or not the 13 year old (or any child between 7 and 14) was guilty of contributory negligence. **Stuck** v. **Kanawha & M. Ry. Co., supra; Pitzer** v. **Tompkies,** 136 W. Va. 268, 67 S. E. 2d 437 (1951).

3. The 6 year old, who under West Virginia law would be incapable of contributory negligence, could recover. **Gunn** v. **Ohio River R. Co., supra,** [Second Appeal]; **Pitzer** v. **Tompkies, supra.**

Far from being absurd, respondents submit that these results are fair and logical. There are many situations in the law where the age of a plaintiff is an important consideration in determining whether there is primary negligence and contributory negligence.

The Virginian Railway Company requires by its own rules* that its train crews maintain a constant lookout (as distinguished from the reasonable lookout required by West Virginia law) of the tracks ahead. This is a commendable rule and offers some assurance that commercial railroad traffic will not be interrupted by a train being derailed by an obstruction on the tracks or a washed out trestle or bridge. It seems a very slight hardship to impose on the railroads at the same time they are in this manner protecting the train, the duty to note the presence of children on the tracks. Furthermore, it is not readily understandable why the railroad need know the age of a trespasser before they run him down.

C. THE GENERAL COMMON LAW AS SET FORTH IN THE RESTATEMENT OF TORTS IS NOT THE LAW TO BE APPLIED UNDER THE DOCTRINE OF ERIE V. TOMPKINS

Over 21 years ago a trespasser named Harry J. Tompkins was injured by a freight train in the State of Pennsylvania. The railroad insisted that its liability should be determined in accordance with Pennsylvania law. Tompkins contended that the railroad's duty and liability should be determined as a matter of general law. This Honorable Court in that important case of **Erie R. Co.** v. **Tompkins**, 304 U. S. 64 (1938), rejected the "general common law" doctrine and enunciated the principle that the law to be applied in any case was that of the state, whether declared by its legislature or by its highest court.

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*Page 2 of Appendix of Plaintiffs' Brief filed in the Court of Appeals.

Today this petitioner, the Virginia Railway Company, seemingly urges this Court to return to the general common law as set forth in the Restatement of Torts. To do so we must also return to the doctrine of **Swift** v. **Tyson**, 16 Pet. 1, 10 L. ed. 865 (1842). Twenty-one years of experience indicate that we should not return to the "mischievous results" of the doctrine of that case.

In answer to petitioner's "pervasive public interest" argument, it should be observed that in addition to being served by a network of railroads, the State of West Virginia is served by numerous interstate trucking concerns, the vehicles of which travel over interstate highways and are essential to the commercial life of the State. Nevertheless, it is believed that the federal judiciary would be just as reluctant (and powerless) to promulgate traffic regulations for trucks in West Virginia as it would to determine whether a railroad should maintain a lookout for trespassers in West Virginia.

Conclusion

The respondents respectfully submit that there is no merit to the Petition for Writ of Certiorari and that the same should be denied.

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